No. ~~11,329~~

IN THE

United States Court of Appeals

For the Ninth Circuit

GETCHELL MINE, INC. (a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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The following is respectfully submitted to the Court in reply to the brief of the United States.

I.

THE APPELLEE HAS NOT CORRECTLY STATED THE FACTS PRESENTED BY THE FINDINGS.

The position of the United States seems to be founded upon certain misapprehensions of fact which are set forth in its brief. These misapprehensions are as follows:

1. In the statement on page 3 of the brief of the United States, the following language is used: "Un-

der an oral contract with another Nevada corporation, Dodge Construction, Inc., the latter removed from surface ground by the use of power shovels and transported by motor trucks taxpayer's ore from spots near the mine mouth to designated stockpiles or to the taxpayer's mill for treatment."

There is nothing in the findings of the Court or stipulation of facts that Dodge Construction, Inc. removed ore from surface ground from spots near the mine mouth to designated stockpiles or to the taxpayer's mill. The finding of the Court is: "Dodge Construction agreed to remove, by the use of power shovels, gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment." (Tr. p. 22).

2. It is stated in the brief of the United States, page 8: "Dodge Construction, Inc., a person engaged independently in the business of transporting property for hire, carried taxpayer's ore by truck from its mine to designated stock piles or to its mill for treatment." There is no finding of fact or stipulation of fact that Dodge Construction, Inc. was, apart from the particular transaction with Getchell Mine, a "person engaged independently in the business of transporting property for hire."

3. It is stated in the brief of the United States, page 8: "The ore was loaded at the mill, the point of origin, and transported to the point of destination, where it was unloaded." There is no finding by the Court or stipulation of fact to this effect.

II.

THE CONTRACT OF DODGE CONSTRUCTION, INC. WITH GETCHELL WAS NOT MERELY A CONTRACT FOR THE HAULING OF CRUDE ORES.

From these three misapprehensions of fact, which are not in accord with the findings of the lower Court and stipulation of facts, the United States has concluded that the agreement of Dodge Construction, Inc. with the appellee was merely a contract for the transportation of ores already mined from the mining properties to the mill. The finding of the Court is that Dodge Construction, Inc. "agreed to remove, *by the use of power shovels,* gold and tungsten ores from the mining properties operated by plaintiff and transport the same by truck to designated stockpiles or to the plaintiff's mill for treatment. That for such removal and transportation, Dodge Construction, Inc. was paid sums ranging from 25¢ to $1.00 per cubic yard, depending on the distance said ores were transported, which varied from 300 feet to 7 miles." (Tr. p. 22). The contract of Dodge Construction, Inc. with appellant was not merely to haul the ores from the mine mouth to the mill but to remove the ores from Getchell premises by the use of power shovels and transport the same to the mill. For both the removal by the use of power shovels and the transportation, Dodge was paid a flat sum varying with the distance from the mill. The brief of the United States assumes that this removal by the use of power shovels was merely a loading operation. In ordinary mining parlance, the removal of ores from mining properties, as found by the Court, means the separation of the ores

by power shovels from the earth in which they are contained, which is basically a mining operation. Accordingly, Dodge Construction, Inc. was paid a flat sum per cubic yard for a single operation which involved both the mining of the ores by the use of power shovels and the transportation of those ores from the place where they were mined to the mill or to stockpiles. This operation by Dodge Construction, Inc. was, at its inception, a mining operation and in the performance of such operation Dodge was not engaged in the business of transporting property for hire, the transportation being merely incidental to the removal of the ores. On the record, therefore, the assumption of the United States that the agreement between Dodge and Getchell involved merely a hauling operation is incorrect. Likewise, on the record, it is apparent that in the performance of the agreement between Dodge and Getchell, Dodge was not engaged "independently" in the business of transporting property for hire.

There is nothing in section 3475(a) of the Internal Revenue Code to indicate that the performance of such an agreement, to-wit, the mining of the ores and the carriage of those ores to the Getchell mill are the subject of the tax imposed by that section or that section 3475(a) would require the imposition of a tax upon an operation by an independent contractor which is basically a part of the mining operations carried on by the taxpayer. In this respect, it is of no consequence that the taxpayer elected to pay an independent contractor for the performance of these services

rather than to perform the operation itself since the primary business of the taxpayer was the production of gold and silver bullion from ores found in the earth and the movement of ores from the mine to the mill was merely incidental to and a part of such production.

The Bureau itself seems to have recognized that a transaction such as was involved in the agreement between the taxpayer and Dodge does not involve taxable transportation of property. In a special ruling, dated January 21, 1946, signed by W. F. Sherwood, Acting Commissioner, and reported in 464 C.C.H., paragraph 6304, it appeared that an owner of timber land entered into a contract with an independent contractor to log all merchantable timber on a certain tract of land and to deliver the logs to a pond for a total consideration of $8.25 per thousand feet. The contract called for loading trucks with logs at the place where the logs were felled and for trucking the same to the pond. All of the equipment used by the independent contractor was owned by the owner of the land. The ruling says:

> "In the affidavits submitted, it is pointed out that the cost of transporting the logs by truck is only a small part of the total contract price. It is also stated that the average distance of log movement by truck does not vary substantially from the average distance of log movement out of the woods by means of tractor and donkey engine.
>
> Careful consideration has been given to the evidence presented by you and it is now the opinion of the Bureau that, in carrying out the terms

> of the logging contracts submitted, the A Company and the B Company are not persons engaged in the business of transporting property for hire within the meaning of section 3475 of the Internal Revenue Code. Accordingly, you are not liable for payment of transportation tax on any portion of the amounts paid by you to these companies under such contracts, or payments made by you under similar logging contracts with other loggers."

We believe there is a clear distinction between transportation per se, within the scope of the tax effect of section 3475(a) of the Internal Revenue Code, and transportation carried on completely within the premises of the producer in furtherance of its business.

In a recent decision of the Interstate Commerce Commission in

> *Lenoir Chair Company,* Contract Carrier Application, Reported in United States Law Week, 18 Law Week 2238, Decided November 8, 1949,

the Commission had occasion to decide whether a manufacturer which transported its own products outbound and supplies for its factory inbound was engaged in transportation for hire where its transportation charges were invoiced separately and were comparable to those charged by common carriers. In holding that, under the facts above, the applicant was not engaged in transportation for hire, the Commission said:

> "If the facts establish that the primary business of an operator is the supplying of transpor-

tation for compensation, then the carrier's status is established, though the operator may be the owner, at the time of the goods transported and may be transporting them for the purpose of sale. If, on the other hand, the primary business of an operator is found to be manufacturing or some other non-carrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or factory enterprise with the purpose of profiting from the transportation performed. They cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise."

It appears also in the present case that the primary function of Dodge under the agreement was to remove the ores by the use of power shovels, such removal constituting a part of the mining operations of Getchell. The carriage of the ores to the mill or stockpiles by Dodge was merely incidental to this primary function. The removal of ores being the primary service to be performed by Dodge under the agreement, it is not consistent with such purpose to conclude that in performing the agreement Dodge was engaged in the business of transporting property for hire.

III.

THE TERM "POINT" AS USED IN THE STATUTE IS TO BE INTERPRETED IN ACCORDANCE WITH ITS USUAL, ORDINARY AND ACCEPTED MEANING.

To be taxable, the transportation referred to in the statute must be from one point in the United States to another. Although the Treasury Department has defined all the other terms in the statute, it has neglected to define the phrase "from one point in the United States to another". In the absence of any definition by the Treasury Department and contained in the Regulations, the term "point" must be given its ordinary, usual and literal meaning. Such ordinary, usual and literal meaning was pointed out in the opening brief of appellant (Br. pp. 26-30). The term "point" is synonymous with "place" and by "place" we mean a geographical place or situation; a locality; or an "Area or portion of land marked off or regarded as marked off and separated from the rest as by occupancy, use or character". In the ordinary signification of the term, the Getchell Mine was a point or place, and being a point or place the point of origin and the point of destination of ores moved within the limits of such property were the same.

The case of

Charles M. Lyle v. United States, 76 Fed. Supp. 787 (N.D. Georgia),

cited on pages 27-28 of appellant's opening brief, has not been distinguished by the United States. This case squarely held that the movement of property by a carrier for hire within the limits of an airfield under

construction did not constitute transportation of property from one point in the United States to another within the meaning of section 3475(a). In the *Lyle* case there were points of origin and destination within the confines of a single limited area constituting one point or place. In that case a subcontractor was employed by a contractor engaged in grading and leveling an airfield, to receive earth from a grading shovel, and move the earth from the shovel to the dump or fill. The drivers of the trucks were employed and paid by the subcontractor, and the contractor was paid an hourly rate for the use of trucks and drivers. That case is, on its facts, no different from the case at bar, and the decision of the Court under those facts seems to have been approved by the Circuit Court of Appeals for the Second Circuit in

Bridge Auto Renting Corporation v. Pedrick,
174 Fed. (2d) 733 at page 738,

cited on page 29 of appellant's opening brief.

The appellant does not ask for any construction of the statute but simply asks that the words of the statute and the phrase "from one point in the United States to another" be given its ordinary, literal and accepted meaning. The United States, on the other hand, would have the Court give the word "point" a meaning other than that contained in the dictionary so as to denominate it "any dot in space". It is thus the United States, and not the appellant, that is asking that the statute be extended by implication.

As respects taxing statutes, in the absence of any ambiguity and when the statute is free from doubt,

the words used therein must be given their ordinary and accepted meaning but if there be any doubt they must be construed most strictly against the taxing authority. The appellee has not called to the attention of the Court any extraneous relevant aids to construction which would cast any doubt upon its meaning and, in the absence of such aids to construction, Congress meant what the words it used would ordinarily convey.

In

United States v. Merriam, 263 U.S. 179, 68 L. Ed. 240,

in which the Court was called upon to determine the meaning of the word "beneficiary", it was urged by the taxpayer, as it is here urged by the United States, that as a practical matter the substance, rather than the form in which the tax was imposed, should be considered. The Court said:

> "On behalf of the government it is urged that taxation is a practical matter, and concerns itself with the substance of the thing upon which the tax is imposed, rather than with legal forms or expressions. But in statutes levying taxes the *literal* meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer." (Italics ours).

The burden is upon the United States to bring the subject sought to be taxed within the letter of the

law and, in the absence of ambiguity, if it cannot do so the person or subject of taxation is free, however apparently he or it may be within the spirit of the law. An equitable construction of the statute may not be urged. The United States urges an equitable construction in that section 3475(a) of the Internal Revenue Code is claimed to be a revenue measure intended to raise money for war and, therefore, entitled to be given special consideration. The United States cites no authority for the proposition that a war revenue measure is to be interpreted differently or given a meaning more broad than a revenue act enacted in time of peace.

If there be any doubt whether Congress intended a movement of property solely on the premises of a commercial enterprise and incidental to the carrying on of that enterprise to be subject to the transportation tax, such doubt must, under applicable rules of construction, be resolved in favor of the taxpayer and against the United States. Thus in

Old Colony Railroad Company v. Commissioner of Internal Revenue, 284 U.S. 552 at 561,

it is said:

> "If there were doubt as to the connotation of the term, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer."

and in

White v. Aronson, 302 U.S. 16 at 20,

it is said:

> "Where there is a reasonable doubt as to the meaning of a taxing act it should be construed most favorably to the taxpayer. * * * 'Tax laws, like all other laws, are made to be obeyed. They should therefore be intelligible to those who are expected to obey them.'"

In

Gould v. Gould, 245 U.S. 151, 62 L. Ed. 211,

the Court said, at page 153 of 245 U.S.:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

IV.

CONCLUSION.

Looking solely to the findings of the Court, the following undisputed facts appear:

That the arrangement of Dodge with appellant called for the mining of ores by the use of power shovels by Dodge and the transportation of the ores from the mine to the mill. For both the mining and the transportation, Dodge was paid a flat sum. The movement of the ores, following their mining, took place entirely on the premises of the Getchell Mine except that part of the ores moved from the Granite

Creek Mine a distance of approximately one mile across a section owned by the United States. There is no finding that Dodge was, apart from its contract with Getchell, a carrier for hire or engaged in the business of transporting property for hire. Upon these findings by the lower Court, we believe we are justified in our conclusion that the performance of the agreement with Getchell did not constitute transportation of property from one point in the United States to another by a person engaged in the business of transporting property for hire within the meaning of section 3475(a) of the Internal Revenue Code.

Dated, Reno, Nevada,
January 13, 1950.

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